No. 84-4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION, *et al.*,
Petitioners,

v.

HAMILTON BANK OF JOHNSON CITY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT HAMILTON BANK OF JOHNSON CITY

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QUESTIONS PRESENTED

1. Whether the application of zoning regulations that results in the total denial to the property owner of the property's use and value constitutes a taking under the Fifth Amendment of the Constitution.

2. When zoning regulations are found to effect a taking, whether the Fifth Amendment requires that the property owner receive just compensation for the time during which his property interest was subject to the regulations, or whether he can only obtain injunctive relief against future application of the regulations.

PARTIES NOT LISTED IN THE CAPTION

WILBURN H. KELLEY, JR.,
County Judge
MITCHEL BEARD,
Planning Commission Member
ROBERT MEDAUGH,
Planning Commission Member
JACK MEAGHER,
Planning Commission Member
JOE BAUGH,
Planning Commission Member
CAROLYN WATERS,
Planning Commission Member
KENNETH MCNEIL,
Planning Commission Member
CHARLES MOSLEY,
Planning Commission Member
MORTON STEIN,
County Planner
THAYER MARTIN,
County Engineer

Hamilton Bank of Johnson City became a wholly-owned subsidiary of Third National Corporation on December 1, 1982, and on September 20, 1983, formally changed its name to Hamilton Bank of Upper East Tennessee. Other subsidiaries of Third National Corporation are: Third National Bank of Nashville; American National Bank and Trust Company of Chattanooga; Third National Bank in Anderson County; Merchants Bank; The First National Bank of Lawrenceburg; The Union Bank; Third National Bank in Sevier County; Citizens Bank; Bank of Obion County; First National Bank of Rutherford County; Third National Mortgage Company; Third Lease Corporation; Third National Life Insurance Company.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 729 F.2d 402. It is set out in full in the Joint Appendix at 44 to 67. The Order and Memorandum of the District Court granting the Judgment Notwithstanding the Verdict is not reported. It is set out in full in the Joint Appendix at 36 to 42.

JURISDICTION

The jurisdictional facts are correctly stated by Petitioners in their statement of jurisdiction. Jurisdiction of this Court rests on 28 U.S.C § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Involved are the Fifth Amendment to the United States Constitution and 42 U.S.C. § 1983 (recited in Petitioners' Brief at 2).

COUNTERSTATEMENT OF THE CASE

I. Preliminary Statement: Correction of Petitioners' Factual Presentation

Petitioners' Brief is little more than an attempt to rehash all of the disputed factual issues resolved by the jury at trial. The evidence discussed in Petitioners' Brief was rebutted, overwhelmingly, with evidence the jury obviously believed was more persuasive than the evidence presented by Petitioners.[1]

This Court has long held that the jury's functions should suffer a minimum of interference and that the jury's determination of factual issues should be accorded great deference, especially in complex cases that are tried over a substantial period of time. *See infra* pages 15-16. This case was tried for fifteen days. Twenty-seven different witnesses testified, some more than once. The transcript of the trial is over 2,000 pages long. The jury's verdict should be affirmed because, after viewing the evidence in the light most favorable to Hamilton and without weighing the credibility of witnesses, it will be abundantly clear that there was material—in fact, overwhelming—evidence in support of the verdict.

[1] The arguments raised in Petitioners' Brief are the same arguments that were raised to, and rejected by, the jury at trial. Specifically, Petitioners' factual assertion that there can be no taking because the developers of Temple Hills never "complied" with any of the applicable regulations was made to the jury in opening statements (R. 40), to the court throughout the trial (R. 1044-45, 1984, 1991, 2017, 2030-31, 2060), and to the jury in closing arguments (R. 2119).

Counsel for Petitioners misstate and miscite the record on numerous occasions. Since many of the misstatements take the form of argument, Hamilton will respond to some of the factual errors in the Argument section of this Brief rather than address those arguments in the Counterstatement of the Case.

Even if the record reflected what Petitioners claim it does, at most they have raised a jury question since the "proof" cited by Petitioners is contradicted by other facts that were presented to the jury. In response, Respondent has assumed that this Court will not function as a trier of fact. Accordingly, Hamilton will not attempt to cite everything in the record that supports Hamilton's claim. Instead, Hamilton will simply address the question whether there was sufficient evidence adduced at trial to support the jury's verdict.

II. Nature and History of the Proceedings

This action was brought by Hamilton Bank of Johnson City (hereinafter "Hamilton" or "Hamilton Bank") pursuant to the Fifth Amendment and provisions of 42 U.S.C. §§ 1983, 1985 against the Williamson County Regional Planning Commission and its individual members and staff (hereinafter "Petitioners"). Hamilton is the owner of 257.65 acres located in the northern portion of Williamson County, Tennessee. (J.A. 374-78, R.610; J.A. 378-91, 818). Hamilton contended that Petitioners illegally and unconstitutionally stopped the development of this property in November 1980, some seven and one-half years after the project had been started in February 1973 (J.A. 5-19). Hamilton contended that the actions of Petitioners violated its federal constitutional rights under the just compensation clause of the Fifth Amendment.[2]

[2] Hamilton also asserted other theories of recovery, including claims under the equal protection and due process clauses of the Fourteenth Amendment, and an allegation that Defendants were estopped from retroactively applying new regulations to the Temple Hills Country Club Estates project (hereinafter "Temple Hills"). Those issues are not before this Court.

Hamilton never alleged that Petitioners' actions merely denied Hamilton the highest and best use of Hamilton's property. Nor did Hamilton contend that Petitioners' actions merely diminished Hamilton's investment backed expectations or denied it the most profitable use of its property. Instead, Hamilton proved that Petitioners' actions resulted in the total denial of all economically viable use of Hamilton's property from October 2, 1980, to April 21, 1982. The temporary wipeout of Hamilton's property use occurred because of the imposition of new land use regulations to the Temple Hills project.[3]

The case was tried from April 5 through April 21, 1982, in the United States District Court for the Middle District of Tennessee, Nashville Division. At the close of all the evidence, the court held that Petitioners had rationally applied the applicable regulations and that Hamilton had not been denied substantive due process or equal protection. (J.A. 37). The case was sent to the jury on the remaining issues of procedural due process, taking without just compensation and equitable estoppel. The court instructed the jury and provided a special verdict form requiring

[3] Petitioners rejected Hamilton's request for reapproval of the preliminary plat on June 18, 1981, for eight reasons. Those eight reasons are summarized on page 3 of Plaintiff's Exhibit 01096. (R. 210, 253). A succinct summary of Hamilton's response to Petitioners' eight objections is set forth in a letter that was sent to each member of the planning commission before the June 18 meeting. This letter was from counsel for Hamilton and appears on unnumbered pages 9-15 of Plaintiff's Exhibit 01096. (*Id.*). Much of the trial was consumed with testimony regarding these eight reasons for rejection and whether they should have been applied to Hamilton's property. The record is replete with references which support the jury's verdict that Petitioners should be estopped from imposing these objections. For purposes of this Brief, these objections will be referred to as the "new regulations."

The letter appearing on unnumbered pages 9-15 of Plaintiff's Exhibit 01096 (*Id.*) also goes to the questions of exhaustion of administrative remedies and request for variances discussed *infra* pp. 40-42.

them to answer five questions. (*Id.*). The jury found against Hamilton and in favor of Petitioners on the issue of procedural due process. (*Id.*).

The jury returned a verdict that Hamilton had been denied economically viable use of its property in violation of the just compensation clause of the Fifth Amendment and awarded $350,000 as compensation. (J.A. 37-38). The jury also found that Petitioners should be estopped under state law from requiring Hamilton to comply with any post-1973 land use regulations. (J.A. 32-33, 37-39).

Petitioners subsequently filed a motion for a judgment notwithstanding the verdict. The court granted the motion in part and denied it in part. The court allowed the jury estoppel verdict to stand and issued a judgment of permanent injunction enjoining Petitioners from requiring Hamilton to comply with any post-1973 regulations. (J.A. 34-42).

The district judge also set aside the $350,000 verdict because, although he found a "denial of economically viable use," he concluded that no taking occurred because "the denial . . . was temporary until such a time as [Petitioners] were estopped from requiring compliance with the present regulations. Such a temporary denial . . . does not, as a matter of law, constitute a taking under the Fifth Amendment." (J.A. 41).

The Sixth Circuit Court of Appeals reversed the trial court on the inverse condemnation issue and reinstated the jury verdict.

III. The Facts

Hamilton is the owner of 257.65 acres in Williamson County, Tennessee. (J.A. 374-78, R. 610; J.A. 378-91, R. 818). Prior to 1973, this acreage and other property was owned by William Temple, who farmed the land. (J.A. 134). Several individuals interested in developing the property for residential purposes applied to the County Commission

to have the Temple land rezoned from agricultural to residential cluster use. (J. A. 133-34). The former chairman of the Williamson County Regional Planning Commission testified that before Temple Hills was developed, a new zone allowing residential cluster units had to be created. (J.A. 133). In cluster developments, houses may be built on smaller lots than would otherwise be allowed upon the condition that sufficient land within the development be left as "open space." Indeed, the *raison d'etre* of the cluster concept is to build upon smaller or more difficult to use portions of a tract in order to use or preserve agricultural, open space, recreational or other features of the property. A considerable amount of debate and study preceded the creation of the Temple Hills residential cluster zone. (J.A. 133, 134-35). The former chairman testified that the developers wanted to build, and the commission wanted to approve, a development that would blend in with the environment and the topography. (J.A. 135-36). The 1973 planning commission even took a bus trip to observe a similar cluster development in Kentucky before approving the Temple Hills project. (J.A. 134-36).

The planning commission was fully aware when it approved the project in 1973 that Temple Hills had steep slopes, some of which exceeded 25%, which was the maximum allowable slope for a building site under the applicable regulations. (R. 450-52). It was the commission's policy, however, to allow houses to be built on hillsides with slopes exceeding 25% because the county was losing much of its good flat land to developments and, in order to protect farming, it was willing to approve hillside building sites such as those located in the Temple Hills development. (R. 340-41, 450-52). Indeed, as a result of this approval and other *de facto* variances, houses were built on many of the steepest slopes before development was stopped. (R. 95, 97).

The 1973 planning commission was also fully aware that the central concept of Temple Hills was to build housing around a private golf course, which would serve as the

necessary open space for the development. (R. 340-42). The planning commission fully participated in making the golf course the open space: it not only approved the project but the secretary of the planning commission also drafted the open space easement, which served to designate the open space by metes and bounds. (R. 341-44). The permanent open space easement, which was recorded by the County, conveyed rights to Williamson County in substantially all of the property in the subdivision except the buildable lots that were to be sold to individuals. (R. 343; Def. Ex. 151, R. 1691). The planning commission's justifiable aim was to make sure that no development could ever occur in the open space without permission of the county. (*Id.*). The developer was locked into the plan approved by the planning commission in 1973 because all the property in the subdivision, except the designated building sites, was subject to the open space easement. The county planner determined that the use of the golf course for open space complied with the applicable regulations, and the planning commission agreed. (R. 350-51).

The preliminary plat approved in 1973 had a notation that the total number of allowable dwelling units was 736. However, lot lines were only drawn in for 469 units; the areas in which the remaining 267 units were to be placed were left blank and bore the notation "This parcel not to be developed until approved by the planning commission." Although Petitioners attached great significance to this statement and argued that the notation limited the total approved density to 469 rather than 736 (R. 122, 123), convincing evidence was introduced to explain this ambiguity and to make clear that the planning commission and the developer agreed in 1973 that density was established at 736 units. (R. 121-24, 218-21, 271-73; Pl. Ex. 9110, R. 1347; J.A. 373, R. 366, 367). Houses have even been built in several of the areas bearing this notation. (J.A. 422, R. 48; J.A. 427, 102, 103; J.A. 91-92; R. 219-21).

It is uncontradicted that density—the number of permitted building sites—was never an issue until 1979. (R. 141). The chairman of the 1973 planning commission testified that 736 units were approved in 1973. (R. 331, 332, 366, 367, 373).[4]

The number 736 was the only number used by the landowners regarding density between 1973 and 1979. That density was determined by using a planning commission formula based on the total number of acres in the project. (R. 449-51). The landowners have been consistent in using that number to describe total density. Hamilton later agreed that the total density should be reduced to 688 units because 18.5 acres of the project had been condemned for the Natchez Trace Parkway. (J.A. 423-24, R. 233-34; J.A. 294-98, R. 173, 199). When Hamilton foreclosed, 212 units had already been built and were not acquired by Hamilton, but had to be counted against total density. Therefore, the total units available to Hamilton was 688 minus 212, or 476 units.

In approving the Temple Hills project, the planning commission knew that it would take ten to twelve years to complete. (R. 348). The commission also knew in 1973 that several million dollars would be spent on the golf course and other improvements, such as sewers and water. (R. 114-17, 344-46). Sewer and water lines had to be brought by the developer from an adjoining town to the project site, and gas lines, underground electricity, telephone lines, roads and drainage all had to be constructed by the developer before the first house was built. (R. 113-14). All of these off-site and on-site improvements were designed to handle 736 units, and three to five million dollars were

[4] His testimony was corroborated by a majority of the other members of the planning commission who served between 1973 and 1979, as well as by other evidence. (R. 138-40; Pl. Ex. 9110, R. 1347; J.A. 373, R. 366, 367). None of his contemporaries on the commission testified to the contrary.

spent by the developers between 1973 and 1979 on the improvements in reliance on the planning commission's many approvals of the project. (R. 113-15, 858-73).

Consistent with the commission-approved open space easement, most of the flat land in Temple Hills was used for the construction of the golf course and other common improvements. (Pl. Ex. 9705, R. 182, 199). The 212 houses and condominiums that were built were located in different sections of the development and were completed between 1973 and 1980. (J.A. 424-25, R. 233-34; J.A. 427, 101, 103).

The history of the relationship between the owners of Temple Hills and the planning commission can be divided into a pre-1979 period, which was relatively free of problems, and a post-1979 period.

Prior to 1979, two separate approvals had to be secured from the planning commission before a landowner could develop property. First, a preliminary plat had to be submitted, compared with the applicable regulations, reviewed by the staff and approved by the planning commission. (R. 49-53). Later, after additional engineering and on-site work was completed, the owner would submit a final plat for approval by the planning commission. (R. 1199-1200). The preliminary plat of Temple Hills was first approved by the planning commission on February 1, 1973. (J.A. 423, R. 223, 226). On May 3, 1973, a revised preliminary plat was approved. (*Id.*). On June 7, 1973, and January 17, 1974, final plats were approved for Sections I and II, respectively. (*Id.*). On June 6, 1974, a revised preliminary plat and a revised final plat of Section I were both approved. (*Id.*). On August 15, 1974, final plat approval was given to Section III. (*Id.*). A revised final plat was approved for Section II on February 6, 1975. (*Id.*). On June 19, 1975, a revised preliminary plat again received approval. (*Id.*). On August 18, 1977, a revised final plat of Section I was reviewed and approved. (*Id.*; Pl. Ex. 1048, R. 141, 156).

On April 20, 1978, the preliminary plat was reapproved even though ownership of the project had changed hands and the golf course had been sold to a third party. (*Id.*; R. 1233-34). This reapproval, like all previous approvals and reapprovals, was granted under the 1973 regulations even though newer, tougher regulations had been enacted at various times between 1973 and 1979. (J.A. 423, R. 223, 226; J.A. 372-73, 100, R. 199; J.A. 257-61, R. 112, 156; J.A. 262-69, R. 119, 156; J.A. 269-71, R. 120, 156; J.A. 271-72, R. 355; J.A. 272-75, 93, R. 156; J.A. 275-78, 93, R. 156; J.A. 198-99, 91-101). The former planning commission chairman testified that it was the *official policy* to reapprove on-going developments under the regulations that were in effect when the project was originally approved in order to avoid changing the rules of development in the middle of the game, especially when a developer had expended considerable sums in developing the property. (J.A. 140-41, R. 369-71).

It is uncontradicted that prior to August 1979, the planning commission *never* rejected either a preliminary or final plat because the project allegedly failed to comply with 1973 regulations. To the contrary, approvals were expressly made under 1973 regulations. The secretary of the planning commission signed each final plat that was approved, attesting that the project met all applicable regulations. (Pl. Ex. 6501, R. 652, 660).

The official policy was underscored by a *grandfather clause* inserted in the revised subdivision regulations (regulations under which Petitioners claim that Temple Hills fails to pass muster). That clause provided that the developer of an on-going project had the right to continue the project under the regulations that were in effect at the time of the original approval. (J.A. 107-08; Pl. Ex. 7526, J.A. 107-08). Additionally, the legislative body of Williamson County conferred "non-conforming use" status on the Temple Hills project, making it exempt from any post-1973 changes in the applicable zoning laws. (R. 226-31; Pl. Ex. 9711, R. 226, 231).

In August 1979, for the first time, the commission chose to ignore the long history of approvals since February 1973, the grandfather clause and the non-conforming use status conferred on the project by the county's legislative body, and imposed new development standards adopted between 1973 and 1979. (J.A. 97-99, 140-41; J.A. 370-71, 187; J.A. 279-84, R. 160, 199).[5]

On October 2, 1980, the developer submitted the preliminary plat for reapproval, but the commission rejected the application. (J.A. 285-99, R. 173, 199; R. 173, 967, 1703, 1712). On October 3, the secretary of the planning commission wrote to the developer and suggested an appeal of the planning commission's decision to the board of zoning appeals. (Pl. Ex. 9112, J.A. 101, R. 199). This letter was written in response to a question the developer had asked at the October 2 commission meeting regarding his rights and the steps he should take following the commission disapproval. (R. 178). The developer had submitted two plats on October 2. (R. 105). One of the plats was the plat that had received numerous approvals since 1973, and the other plat was one that had been adjusted in an effort to work with the planning commission. (*Id.*). The developer then made application to the board of zoning appeals for interpretation of the regulations, and specifically for a determination of whether the 1973 regulations applied to the project. (J.A. 86-87, R. 179).

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[5] Several witnesses, including state and local officials, testified at trial that this change in policy was the result of defendant county executive Wilburn Kelley's decision to implement a "no-growth" policy in Williamson County. (R. 57-60, 556, 591, 1023-24). A former county planner testified that Kelley was politically motivated and that he was instructed by Kelley to work against the approval or reapproval of any developments, including Temple Hills, even if the developments satisfied the applicable regulations. (R. 59-60). In any event, it is undisputed that shortly after Kelley hired a new county planner, the commission changed its position and imposed new regulations on the Temple Hills development. (J.A. 279-84, R. 160, 199; Def. Ex. 94, R. 1102; Pl. Ex. 1078, R. 164, 199; Pl. Ex. 1079, R. 167, 199; J.A. 91-99, 100-01, 105-07, 198-201).

On November 11, 1980, the board of zoning appeals ruled that the 1973 regulations applied to Temple Hills. (J.A. 328, R. 179, 199; J.A. 163-76; R. 179-80). On November 26, after the board of zoning appeals had reversed the planning commission, Hamilton foreclosed on 257.65 acres of the Temple Hills project. (J.A. 378-91, 189-90). The foreclosure was limited to the undeveloped property and, as Petitioners concede in their brief, did not include the 212 units that had already been built. Brief for the Petitioners at 9. The only property in the Temple Hills project that Hamilton has ever owned, then, are the orange and yellow shaded areas on Plaintiff's Exhibits 9707 and 9708. (J.A. 426, 103, R. 241-42; J.A. 427, 102, 103). As a result of the foreclosure, Hamilton acquired all of the predecessor developer's rights, title and interest in the 257.65 acres. (J.A. 378-91, 189-90).

Prior to 1976, Hamilton had invested $900,000 in the Temple Hills project. (R. 799). As of the summer of 1977, Hamilton had loaned $2,400,000 to the project developer. (R. 790). This money was invested in good faith reliance upon previous commission approvals and assurances that all regulations were being met. (R. 789-90).

In an effort to work with the commission and avail itself of all administrative remedies, Hamilton's representatives met with, and requested preliminary plat approval by, the planning commission. (Pl. Ex. 1093, R. 196, 199; Pl. Ex. 9605, R. 197, 199; R. 196-98, 1360). Several witnesses testified that it became obvious from this series of meetings in the spring of 1981 that Hamilton would be unable to reach an agreement with the county because the county kept changing its standards and adding prerequisites to plat approval. (R. 268, 942-45, 959-65).

On June 18, 1981, Hamilton submitted two preliminary plats for consideration by the commission. (Pl. Ex. 1096, R. 210, 253). One was designed to meet several of the commission's objections and the other was the preliminary plat that had been reapproved on numerous occasions since

1973. (*Id.*). Neither of these plats was approved. At the June 18 meeting, the county attorney indicated that it would be futile to appeal the planning commission's decision to the board of zoning appeals again because the commission would ignore any decision made by that board. (J.A. 187-88). As a last resort Hamilton decided to bring this lawsuit. (*Id.*).

SUMMARY OF THE ARGUMENT

The straightforward language of the Constitution, supported by relevant caselaw, noted land use commentators, and the public policy considerations outlined below, makes plain that when public control of private property goes so far as to result in a taking, just compensation is the only appropriate remedy. The just compensation clause, like the due process and equal protection clauses, is grounded in the equity concept of doing what is fundamentally fair under the circumstances of each case. Once a taking has been found to occur, this concept precludes the utterly inflexible remedy rule urged upon this Court by Petitioners and amici.

The Fifth Amendment does not pose the taking question in simplistic terms of "police power" versus "eminent domain power" exercise. Hence remedy cannot be determined by the mere form that government uses to label an action but must be addressed on a case-by-case review of the facts.

Not every harsh regulation is necessarily compensable; but neither can every taking be necessarily uncompensable. At the very least, the right to file an inverse condemnation action for damages surely lies in those few cases in which harsh regulation is alleged to be so onerous as to result in the denial of *all* use of one's property. It is precisely that allegation of a temporary taking that was proven in this case by the evidence and was sustained by both the jury and appellate court below. The compensation remedy is

especially desirable, and necessary, in those rare instances in which government action, though so severe as to effect a taking, is nonetheless valid.

Good land use planning must be governed by fundamental principles of fairness and justice and, absent extraordinary circumstances, must include a consideration of individual rights. The disruption that occurred in this case, however, was the result of the government's irresponsible application of its land use controls.

In these times of more complex and multi-varied governmental actions combining to affect land use, just compensation not only can repair an individual's loss but it can also pierce the veil of a community's exclusionary or excessively arbitrary land use policies. Heavy-handed regulatory conduct, even if struck down as unconstitutional or invalid, all too often reappears in a different guise to accomplish the same restrictive results, namely artificially increased land and housing costs. A damages remedy lessens the likelihood that a community will continue to play freely with the constitutional rights of its citizenry, be they property owners or housing consumers.

This action was originally filed in federal court. After a lengthy trial and a full consideration of all the issues, the jury found that a taking had occurred and compensation was appropriate. The jury verdict was affirmed, after a careful review, by the Court of Appeals. The issue of inverse condemnation is ripe for adjudication.

For this case, at bottom, is about substance over form, equity over legalism, the recognized need for the remedy to fit the wrong, and the right to meaningful judicial access to seek appropriate redress for unmistakable constitutional harm.

ARGUMENT

I. Standard of Review

The standard of review of the judgment notwithstanding the verdict applied by the Court of Appeals below was:

> On a motion for judgment n.o.v. as on a motion for a directed verdict, the district court must determine whether there was sufficient evidence presented to raise a material issue of fact for the jury. . . . Furthermore, the standard remains the same when the trial court's decision is reviewed on appeal.

Hamilton Bank of Johnson City v. Williamson County Regional Planning Commission, 729 F.2d 402, 404, J.A. 44, 48 (6th Cir. 1984). This is the standard long established by this Court. *See, e.g., Brady v. Southern Railroad*, 320 U.S. 476, 479-80 (1943); *Pennsylvania Railroad Co. v. Chamberlain*, 288 U. S. 333, 343 (1933).

This standard is based on the premise that the jury's functions should suffer a minimum of interference; the jury' s determination of issues of fact should be accorded great deference. The reviewing court should not weigh the evidence, pass on the credibility of witnesses, or substitute its judgment for that of the jury. 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2524, at 542-44 (1971).

Furthermore, when reviewing a jury's verdict, the court should view the evidence in the "light most favorable" to the party against whom the motion is made, and that party should be given "the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962). This court has cited with approval the rule laid down by Professor Moore in his treatise on federal practice:

> On appeal, likewise, the appellate court must consider the evidence in its strongest light in favor of the party against whom the motion for directed verdict was

made, and must give him the advantage of every fair and reasonable intendment that the evidence can justify.

Id. at 696 n.6 (quoting 5 *Moore's Federal Practice* 2316 (2d ed. 1951)) (now found at 5A *Moore's Federal Practice* ¶ 50.02[1], at 50-34 to 50-35 (2d ed. 1984)); *see also Perkins v. Standard Oil Co.*, 395 U.S. 642, 648 (1969). Significantly, the Sixth Circuit has carefully reviewed the evidence and found it sufficient both to create an issue of fact for the jury and to support the jury's verdict.

The standard of review is especially pertinent in the instant case, in which Petitioners merely reargue many of the factual issues already resolved by the trier of fact.

II. The Application of Land Use Regulations That Denied Economically Viable Use of Hamilton's Property Effected a "Taking" Within the Meaning of the Just Compensation Clause

The Fifth Amendment states in clear and unequivocal terms:

> "[N]or shall private property be taken for public use, without just compensation."

The Fifth Amendment is made applicable to the states through the Fourteenth Amendment. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980); *see Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 239, 241 (1897).

The "taking" allegation in the instant case arises in the context of what is commonly referred to as "inverse condemnation," which, as this Court recently noted, is merely a "shorthand description" for a cause of action against a government defendant in which a landowner recovers just compensation for a "taking" of his property under the Fifth Amendment, even though no formal exercise of the power of eminent domain has been attempted by

the taking agency. *United States v. Clarke*, 445 U.S. 253, 257 (1980).

It is now well-established that a regulation can effect a Fifth Amendment taking. *See, e.g., Agins v. City of Tiburon*, 447 U.S. 255 (1980); *PruneYard Shopping Center v. Robbins*, 447 U.S. 74, 83 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164, 174 (1979); *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978); *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

In last term's *Ruckelshaus v. Monsanto Co.*, 104 S.Ct. 2862 (1984), the Court reaffirmed the vitality of the general principle that a regulation can effect a taking. This principle has been held to apply to zoning laws. *Agins v. City of Tiburon*, 447 U.S. at 260.

A full discussion of this Court's precedents regarding regulatory takings is set forth in Justice Brennan's dissenting opinion in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 647-53 (1981) [hereinafter referred to as *San Diego Gas*, Brennan], and will not be repeated here. *See also* Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls*, 15 Rutgers L.J. 15 (1983).

This Court has noted that there is no "set formula to determine where regulation ends and taking begins," *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962), and that the determination of when a taking occurs "calls as much for the exercise of judgment as for the application of logic," *Andrus*, 444 U.S. at 65. *See, e.g., Ruckelshaus*, 104 S. Ct. at 2874 ("ad hoc, factual inquiry" must determine when "justice and fairness" require that economic injury

by the public be deemed a compensable taking); *San Diego Gas*, Brennan, 450 U.S. at 649; *Penn Central*, 438 U.S. at 124 ("ad hoc, factual inquiries"); *United States v. Central Eureka Mining Co.*, 357 U.S. at 168 ("question properly turning upon the particular circumstances of each case").

Even though the Court has established no "set formula" for determining a compensable taking, this Court "has identified several factors that should be taken into account when determining whether a governmental action has gone beyond 'regulation' and effects a 'taking.'" *Ruckelshaus*, 104 S.Ct. at 2875; *see also* Michelman, *Property as a Constitutional Right*, 38 Wash. & Lee L. Rev. 1097, 1102 (1981). In *Ruckleshaus*, this Court reiterated that the factors to be considered are the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations. *Ruckelshaus*, 104 S.Ct. at 2875; *San Diego Gas*, Brennan, 450 U.S. at 648. The third factor was the focus of this Court's attention in *Ruckelshaus;* the Court held there that "the force of this factor is so overwhelming . . . that it disposes of the taking question. . . ." *Id.*

A. The Economic Impact Of Petitioners' Regulations Was Devastating

In this case, the economic impact of Petitioners' regulations is so overwhelming that it disposes of the taking question. It is well established that there is no taking merely because a landowner's best or most profitable use of the property has been denied. *Penn Central*, 438 U.S. at 125. It is similarly true that mere diminution of property value alone does not constitute a taking. *Id.* at 124. When determining whether a regulatory taking has occurred, the standard is whether "all or most" of a property's economically viable use has been denied. *San Diego Gas*, Brennan, 450 U.S. at 653; *United States v. Dickinson*, 331 U.S. 745, 748 (1947); *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945); *see also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Agins*, 447 U.S. at

260; *Penn Central*, 438 U.S. at 127; *Armstrong v. United States*, 364 U.S. 40 (1960). The district court properly instructed the jury concerning these points, and also told the jury that "there can be no impermissible taking within the meaning of the Fifth Amendment if the regulations as applied permit economically viable use of the property." (R. 2015). The jury returned a verdict in Hamilton's favor, specifically finding that Petitioners' regulations denied Hamilton all economically viable use of its property. (J.A. 32).

In reviewing this jury verdict, the evidence is overwhelming that a taking of Hamilton's property interest occurred.

One of Petitioners' own witnesses admitted on cross examination that the imposition of the new regulations made it "impossible" to complete the project. (J.A. 427, 102-03; R. 1721).

Uncontradicted testimony at trial showed that the new regulations imposed by the planning commission eliminated 409 potential building sites from the development plan, leaving only 67 scattered building sites, which would result in a loss of over $1,000,000 to complete the project. (J.A. 159-60). In other words, the cost of finishing the Temple Hills development in compliance with the post-1979 regulations would be in excess of $1,000,000 over and above any revenues that would be generated from the sale of the completed development. Another witness testified that Hamilton has been unable to sell the property since the new regulations went into effect because no one is interested in investing in a project that offers nothing more than the opportunity to lose over $1,000,000. (R. 813).

Hamilton's expert appraiser also stated in uncontradicted testimony that the Temple Hills property under the retroactively imposed regulations had "no significant market value other than that which someone would pay for open

space."[6] He testified that Hamilton's land was "not worth anything" under the heavy burden of the new regulations. (J.A. 162-63).[7]

The Sixth Circuit also noted that "[t]here is no evidence inconsistent with the appraiser's reasoning or conclusion, and his testimony was sufficient to allow the jury to find that with the eight restrictions Hamilton's property had no remaining economically viable use." *Hamilton Bank of Johnson City v. Williamson County Regional Planning Commission*, 729 F.2d 402, 406 n.5, J.A. 44, 52 n.5 (6th Cir. 1984). Indeed, Petitioners' primary contention in this Court, as it was in the Sixth Circuit, is not that Hamilton's property retains an economically viable use, but rather that Hamilton has never complied with either the 1973 or 1977 regulations and thus never acquired vested development rights that could have been taken by the commission.

This argument fails, especially when the evidence is viewed in the light most favorable to Hamilton. The evidence is clear and convincing that, at least under the pre-1979 commission's interpretation of the regulations, Hamilton complied fully.

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[6] The expert previously appraised the project on several occasions. (J.A. 158-59, 161). A summary of his testimony appears in Plaintiff's Exhibit 9850. (J.A. 374-78, R. 610).

[7] His analysis of the problem created by the overregulation is lengthy and detailed. For example, he noted that while all land has some value just because it is land, the Temple Hills project had "no measurable value" because the property could not be developed economically and there was no reasonable alternative use for the land. (J.A. 162-63). The land is zoned in a manner that will not permit farming, nor is the nature of the land even conducive to farming. (J.A. 134, 162-63). The flat land in the project had already been used for the golf course, and the remaining property was steep and rocky. (J.A. 134, 146, 162-63). The expert's uncontradicted conclusions on the economic infeasibility of developing Temple Hills were corroborated by a land-use planner who testified regarding the impact of Petitioners' demands and by another witness who said that the cost of completing the project under the new regulations would be astronomical. (J.A. 99, 202-07).

As the Sixth Circuit noted in its opinion, the jury determined that Hamilton had acquired a vested right to develop Temple Hills. *Hamilton Bank*, 729 F.2d at 407, J.A. at 53-54. The Sixth Circuit also concluded that Petitioners' actions interfered with Hamilton's reasonable expectation that the development could be completed and that this was "the developers' 'primary expectation concerning the use of the parcel,' *Penn Central*, 438 U.S. at 130, and was backed by considerable investment in land and improvements." *Hamilton Bank*, 729 F.2d at 407, J.A. at 54. Even the district court found that there had been a "significant" interference with Hamilton's investment-backed expectations. (J.A. 40). Petitioners did not appeal this finding. Nor did they appeal the jury's verdict that it would be inequitable and unjust to destroy Hamilton's vested right to develop Temple Hills.[8] The district court did not disturb the jury's verdict that Petitioners were estopped from destroying Hamilton's vested right to develop Temple Hills. Because no appeal for this verdict has been taken, Petitioners are foreclosed from rearguing whether Hamilton has significant vested rights in the property. *United States v. American Railway Express Co.*, 265 U.S. 425, 435 (1924).

It is undisputed, then, that Hamilton's vested right to continue developing the subdivision was taken from it during the interim period that Petitioners' regulations

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[8] The judgment of the district court pursuant to Federal Rules of Civil Procedure, Rule 50(c)(1), included a conditional denial of Petitioners' motion for new trial of the issues decided by the jury. (J.A. 41). Petitioners have not "assert[ed] error in that denial," as provided by Rule 50(c)(1), by perfecting an appeal, *see* Petition for Writ of Certiorari at 9, or by asserting this error in its appellate brief or its petition for rehearing. Petitioners' arguments before the court of appeals were limited to support for the judgment notwithstanding the verdict; they did not challenge the district court's conclusion that the evidence established a "denial of economically viable use" (J.A. 41), which the district court held was not a taking merely because it was temporary. (*Id.*). Petitioners and amici cannot now challenge the verdict and argue that there was merely diminution.

were in force. Courts have long recognized the need to shield developers from changes in regulations governing the development process that would unfairly impede ongoing projects, resulting in wasted resources and unacceptably higher risks for the development community, by invoking the intertwining doctrines of vested rights and equitable estoppel to bar application of the new regulations. Estoppel reflects equitable considerations, while the vested rights doctrine has its origins in the constitutional realm. D. Mandelker, *Land Use Law* § 6.12 (1982); Heeter, *Zoning Estoppel: Application of the Principles of Equitable Estoppel and Vested Rights to Zoning Disputes*, 1971 Urb. L. Ann. 63, 64-65; *see Kaiser Aetna*, 444 U.S. at 179.[9]

The constitutional basis of vested rights has been noted in modern cases. *See, e.g., Aries Development Co. v. California Coastal Zone Conservation Commission*, 48 Cal. App. 3d 534, 549, 122 Cal. Rptr. 315, 325 (1975); *Life of the Land, Inc. v. City Council*, 60 Haw. 446, 592 P.2d 26 (1979); *Reichenbach v. Windward at Southampton*, 80 Misc. 2d

[9] Why is the issue so critical now? One reason is that in the past decade or two, building projects have become larger, of longer duration, and more complex. The multiphase project extending over several years of construction is more exposed to alterations in public policy, while at the same time it requires more flexibility to cope with market changes. Also, it seems to be a fact of life that land use regulations are changing more often and more drastically than ever before. In this era of increasing sensitivity to environmental, design, conservation, and other concerns, there are growing pressures to regulate development more closely. In some jurisdictions, slowing or halting growth has become a topic of strong interest. These pressures have led in the past 10 years to more rapid changes in regulation and more restrictive regulations. With every change in plans, zoning boundaries, or land development regulations comes the probability of injury to property holders who expect to develop their properties according to the regulations which were in effect when they made their investments.

C. Siemon, W. Larsen & D. Porter, *Vested Rights: Balancing Public and Private Development Expectations* 3 (Urban Land Inst. 1982) [hereinafter cited as *Vested Rights*].

1031, 364 N.Y.S.2d 283 (N.Y. Sup. Ct.), *aff'd*, 48 A.D.2d 909, 372 N.Y.S.2d 985 (1975), *appeal dismissed*, 38 N.Y.2d 912, 346 N.E.2d 557, 382 N.Y.S.2d 757 (1976). Public policy demands some semblance of reasonable predictability in the land development process, and the further along a development proceeds in gaining all necessary governmental approvals, the more concrete a proposal shapes into reality, the stronger becomes the constitutional notion of fundamental fairness to be accorded the particular landholder.

As Professor Tribe states, "We deal here with the idea that government must respect 'vested rights' in property and contract—that certain settled expectations of a focused and crystallized sort should be secure against governmental disruption, at least without appropriate compensation." L. Tribe, *American Constitutional Law* § 9-1 (1978). Generally, in order to accrue vested rights, a developer must have made substantial expenditures or otherwise committed himself to his substantial disadvantage in good faith reliance on some act of the government prior to the regulatory change. *See, e.g.*, R. Ellickson & A. Tarlock, *Land-Use Controls* 203-04 (1981); C. Siemon, W. Larsen & D. Porter, *Vested Rights: Balancing Public and Private Development Expectations* 13 (Urban Land Inst. 1982). That is also the general rule in Tennessee. *Schneider v. Lazarov*, 261 Tenn. 1, 390 S.W.2d 197 (1965). The record in this case clearly demonstrated to the courts below that Hamilton had acquired all rights to the subdivision, rights that were taken by imposition of the new regulations and merited constitutional protection.[10]

A substantial destruction of "investment-backed expectations," as we have here, rises to the level of a

[10] *See, e. g.*, American Law Institute, *Model Land Development Code* § 2-309 (1976); *Vested Rights*, *supra* note 9; Cunningham & Kremer, *Vested Rights, Estoppel, and the Land Development Process*, 29 Hastings L. J. 623 (1978); Hagman, *Estoppel and Vesting in the Age of Multi-Land Use Permits*, 11 Sw. U.L. Rev. 545 (1979).

taking of private property for a public purpose, giving rise to a claim under the just compensation clause. *Ruckelshaus*, 104 S.Ct. 2862; *Loretto*, 458 U.S. 419; *San Diego Gas*, Brennan, 450 U.S. at 648; *Agins*, 447 U.S. at 262; *Kaiser Aetna*, 444 U.S. at 175; *Penn Central*, 438 U.S. at 124, 127-28. Hamilton had a reasonable expectation that the development could be completed in light of the evidence that the commission approved preliminary and final plats on numerous occasions, much of the infrastructure was already built for the entire project of 736 units, and the board of zoning appeals had ruled in the owner's favor.

B. A Temporary Taking of the Whole of Respondent's Property Interest Was Found by the Jury and Court Below

The district court reasoned that the estoppel verdict made the total denial of property use only a temporary one, and therefore assumed no Fifth Amendment taking could occur. A temporary denial of property, however, can be a taking and "should be analyzed according to the same framework applied to permanent irreversible 'takings.'" *San Diego Gas*, Brennan, 450 U.S. at 657; *see also Penn Central*, 438 U.S. 104; *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *United States v. Causby*, 328 U.S. 256 (1946); *United States v. Petty Motor Co.*, 327 U. S. 372 (1946); *United States v. General Motors Corp.*, 323 U.S. 373 (1945).

Petitioners and amici argue that diminution of property value is all that occurred in this case because they look at the 676-acre Temple Hills development and refuse to separate out Hamilton's property interest. Yet Petitioners' actions denied Hamilton the use of *all* of *its* property since it was economically infeasible to develop its entire 257.65 acre tract. Petitioners' actions destroyed the right to use its property for the interim period the regulations were in place.

Even if the Temple Hills development is viewed as a whole, adding Hamilton's successor property interest to that of the prior developers, Hamilton's reasonable investment-backed expectations were denied at least to the same extent as they were to the property owner in *Ruckelshaus*. In *Ruckelshaus*, the property owner did not suffer the loss of its entire business or even all of its trade secrets. In fact, a taking occurred, if at all, only with respect to a limited number of trade secrets submitted to the government agency over a limited period of time.

As noted, Hamilton does not own the already developed and sold 212 units, and those units are not part of this lawsuit. Brief for the Petitioners at 9. Petitioners' new regulations and new interpretation of old regulations were never *applied* to those 212 units; only the 257.65 acres owned by Hamilton were subjected to the application of the disputed regulations. In *San Diego Gas*, only a portion of the owner's property was subjected to the regulations in question. In the instant case, *all* of Hamilton's property was subject to the new regulations. It is patently illogical to combine land owned by separate owners over a huge development for the purpose of determining whether one owner's land was taken. Whether the prior developer of Temple Hills made a profit or not on his ownership interest is totally irrelevant. The issue is the economic impact that the application of Petitioners' regulations had on Hamilton.[11]

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[11] For example, assume that in 1973 the original developer had divided the project exactly in half and sold 50% of the land to A and 50% of the land to B. Assume further that A completed the development of his portion of the project in five years and made a profit, and that B did not complete his portion of the project in five years. During the sixth year, the commission passes new regulations that, when applied to B's property, deprived B of all economically viable use of *his* property. Petitioners and amici would argue that one would have to look at the combined financial consequences to A and B in order to determine whether a taking had occurred, since the project was originally

(Footnote continued on next page)

Petitioners and amici cite *Penn Central* in support of their "whole" vs. "part" argument. Trying to tie *Penn Central*'s unique circumstances to the facts of this case, however, is futile. There, what was allegedly taken was only *prospective* development expectations, that is, a proposal to build a fifty-five story office tower over the owner's train station. But here, it was vested development rights in an on-going, partially-built subdivision that were taken. In *Penn Central*, no taking occurred because the owners conceded and the Court held that the terminal building was still earning a reasonable return on the owner's investment, the transferable development rights accorded the owner were valuable, and a tax exemption was given the regulated property. But in this case, the owner's property cannot be used as a result of the downzoning; nothing of value is left. In *Penn Central*, the owners claimed that the historic site designation resulted in a taking because of a significant diminution in the property's value. But in this case, there was total denial of economic use.

The Court in *Penn Central* noted that one must look at the owner's property interest as a whole when deciding what is being taken; in that case, the tax block designated as the historic site was deemed the appropriate parcel. In this case, Hamilton's entire realty interest, 257.65 acres, was the subject of the downzoning, and its entire realty interest was, as a result, unusable and could not be sold. Hence Hamilton alleged and proved a temporary taking. *Penn Central* would have been closer to the facts of this case had the Penn Central owners received development approvals from the city, been issued permits, started

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(Footnote 11 continued)
approved as a single development in 1973. This argument ignores financial realities and does not offer any guidance as to how one would determine a "whole" project. Whether a taking has occurred should be determined with respect to individual owners and property rights.

construction over the train station, put up steel girders and then been stopped by a newly-applied regulatory scheme. But *Penn Central* did not concern vested development rights.

III. The Just Compensation Clause Requires the Inverse Condemnation Remedy for Application of Regulations that Destroy a Property's Use; Injunctive Relief Alone Is Not an Adequate Remedy

After deciding the threshold issue of whether a taking occurred, the Court must consider whether the jury's award of $350,000 as just compensation was correct. The language of the Constitution is clear that the government cannot take property without providing "just compensation" for that taking. Based upon that language, the purpose of the takings clause, and the previous decisions of this Court, Justice Brennan concluded that compensation is proper in the land use regulatory context. His carefully considered opinion in *San Diego Gas* provides that when a regulation is found to be so burdensome as to effect a taking, the regulating agency can either amend the regulation to correct its offending nature or can proceed to condemn the property, either by eminent domain proceedings or by continuing the offending regulation. In either event, however, the agency must provide compensation for the time that the regulation deprived the owner of any economically viable use of his property. *San Diego Gas*, Brennan, 450 U. S. at 646-61.

The Sixth Circuit found Justice Brennan's reasoning persuasive in reinstating the jury's verdict. Petitioners and some of their amici take issue with the Brennan analysis.[12]

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[12] Significantly, the amici curiae brief of the National Association of Counties, et al., concedes that compensation should be allowed when "egregious circumstances" arise from use of the regulatory power. Brief of the National Association of Counties, et al., at 16.

They urge that injunctive relief is an adequate remedy in all cases involving regulatory takings. They urge the Court to lay down an ironclad rule that compensation can never be awarded based on the harshness of impact on a person. But their arguments ignore the emphasis on individual rights present in the Bill of Rights. *See Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971) (damage remedy implicit in Fourth Amendment; of course, the Fifth Amendment just compensation clause provides an explicit remedy).

The Sixth Circuit decision is certainly not unique. In just the last three years, Justice Brennan's opinion has been cited with approval by the Fifth, Seventh, Ninth and Eleventh Circuits, as well as the Court of Claims, whether a taking was found or not, as well as the supreme courts of Alaska, Florida, Minnesota, New Hampshire, North Dakota and Wisconsin. In this same time period, the supreme courts of Illinois, Iowa, Montana, Oregon and Rhode Island agreed that land use takings must be compensable without citing to *San Diego Gas.*[13]

[13] *Martino v. Santa Clara Valley Water Dist.*, 703 F.2d 1141, 1148 (9th Cir.), *cert. denied*, 104 S. Ct. 151 (1983); *Fountain v. Metropolitan Atlanta Rapid Transit Auth.*, 678 F.2d 1038, 1043 (11th Cir. 1982); *Devines v. Maier*, 665 F.2d 138, 142 (7th Cir. 1981); *Deltona Corp. v. United States*, 657 F.2d 1184, 1190 (Ct. Cl. 1981), *cert. denied*, 455 U. S. 1017 (1982); *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1199 (5th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982); *Pioneer Sand & Gravel v. Anchorage*, 627 P.2d 651, 652 n.2 (Alaska 1981); *Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374, 1383 (Fla.), *cert. denied*, 454 U.S. 1083 (1981); *Harris Trust & Savings Bank v. Duggan*, 95 Ill. 2d 516, 449 N.E.2d 69 (1983); *Osborn v. City of Cedar Rapids*, 324 N.W.2d 471 (Iowa 1982); *Pratt v. State*, 309 N.W.2d 767, 774 (Minn. 1981); *Knight v. City of Billings*, 197 Mont. 165, 642 P.2d 141 (1982); *Burrows v. City of Keene*, 121 N.H. 590, 597, 432 A.2d 15, 19 (1981); *Rippley v. City of Lincoln*, 330 N.W.2d 505, 510 (N.D. 1983); *Suess Builders Co. v. City of Beaverton*, 294 Or. 254, 656 P.2d 306 (1982); *Annicelli v. Town of South Kingstown*, 463 A.2d 133 (R.I. 1983); *Zinn v. State*, 112 Wis. 2d 417, 428-29, 334 N.W.2d 67, 72-73 (1983).

The law of takings as it applies to regulatory actions traces its beginnings to the decision by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). In that opinion, Justice Holmes wrote that:

> The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. . . .

Id. at 415. Justice Holmes' opinion clearly contemplates that regulation can effect a taking and that compensation would be paid if such a taking occurred. *San Diego Gas*, Brennan, 450 U.S. at 649-50 & n.14.

Precedent makes clear that once a taking has occurred, compensation must be awarded. The remedy is self-executing. That result was reached over fifty years ago in *Jacobs v. United States*, 290 U.S. 13, 16 (1933) (cited in *San Diego Gas*, Brennan, 450 U.S. at 654-55), where the Court stated:

> The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. That right was guaranteed by the Constitution. The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. *Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment.* (emphasis added).

The United States' Brief, in discussing ripeness and mootness, suggests that a limit should be placed on this self-execution. In the federal context, the United States argues that where Congress has not specifically provided a Tucker Act remedy for actions by an agency, injunctive relief, not compensation, is appropriate. "In those circumstances, the court may enjoin the operation of the statute or agency action to the extent it constitutes a taking, not only

because a Tucker Act remedy is not available, but also because Congress did not authorize the agency to engage in action that would constitute a taking and thereby give rise to a claim for just compensation." Brief for the United States at 17 n.12.

The United States implies that *Ruckelshaus* supports this position. In fact,the opposite is true. Where constitutional rights are at stake, the Court is not willing to interpret congressional silence to mean that Congress intended to withhold a remedy mandated by the Constitution. The Court stated:

> In determining whether a Tucker Act remedy is available for claims arising out of a taking pursuant to a federal statute, the proper inquiry is not whether the statute "expresses an affirmative showing of congressional intent to permit recourse to a Tucker Act remedy," but "whether Congress has in the [statute] *withdrawn* the Tucker Act grant of jurisdiction to the Court of Claims to hear a suit involving the [statute] 'founded . . . upon the Constitution.'"

Id. at 2881 (citing *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 126 (1974)). It is not necessary for Congress, nor was it necessary for the state of Tennessee, to give the agency in question the explicit authority to take property in order for Hamilton to obtain monetary relief. To read the just compensation clause otherwise would render it a nullity.

A federal government task force has found that since the early 1970's, rising housing costs have been "greatly exacerbated by" growing local land use regulations that unnecessarily restrict new housing development. "These new factors that have quickened the pace of rising housing costs portend a long-term problem for the future unless major steps are taken." U. S. Department of Housing and Urban Development, *Final Report of the Task Force on Housing Costs* 4 (May 1978); *see* U.S. General Accounting Office, *Report to the Congress—Why Are New House Prices So High, How Are They Influenced by Government Regulations, and Can Prices Be Reduced?* 41 (May 1978).

The Douglas Commission, in its exhaustive report to the President and Congress a decade and a half ago, found that certain zoning and other land use control abuses unnecessarily increased housing costs to such a degree as to lead to exclusionary practices relating to residential developments. This frequently resulted when "[t]he community rigs its master plan and accompanying zoning ordinance" with "excessive" standards and prohibitions. One of the Commission's recommendations for a regulation that went so far as to take one's property was that compensation should be paid. This, the Commission thought, would assist in leading toward a more orderly urban development. Report of the National Commission on Urban Problems, *Building the American City* 18-19, 199-253 (specifically 206, 211-17, 224-26, 251) (1968). The Douglas Commission's findings were recently reemphasized and updated in the *Report of the President's Commission on Housing* 177-83, 199-200 (1982).[14]

Finally, Petitioners and amici attack Justice Brennan's *San Diego Gas* opinion on a variety of policy grounds. They recite a list of horrors that may occur if courts continue to award compensation for regulatory takings. It is clear, of course, that policy considerations have no place in this analysis given the clear language of the Constitution. *San Diego Gas*, Brennan, 450 U.S. at 661 n.26. Yet, even if policy is granted a role, the arguments by Petitioners and amici are either unfounded or exaggerated, and, in fact, countervailing policy considerations support the award of

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[14] *See also* L. Sagalyn & G. Sternlieb, *Zoning and Housing Costs* (1973); S. Seidel, *Housing Costs and Government Regulations* (1978); Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 Yale L.J. 385, 490 (1977); Roberts, *An Appropriate Economic Model of Judicial Review of Suburban Growth Control*, 55 Ind. L.J. 441, 461-64, 487-89 (1980).

compensation. *See* Comment, *Just Compensation or Just Invalidation: The Availability of a Damages Remedy in Challenging Land Use Regulations*, 29 UCLA L. Rev. 711, 724-32 (1982).

A. Compensation is an Efficient Remedy

Some amici contend that an award of compensation in regulatory taking cases would not lead to an "optimum remedy." Brief of State of California, et al., at 11. In fact, the availability of a compensation remedy for temporary takings should lead to more efficient land regulation. *See* Blume & Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 Calif. L. Rev. 569, 572, 582, 623-24 (1984). Amici argue as if an award of compensation for a regulatory taking presents a windfall to a landowner. This is decidedly not the case. In fact, the landowner suffers an extreme loss during the time the regulation is in place. This loss is imposed on the landowner by an activity being performed for the public good, *i.e.*, land regulation. The just compensation clause represents a judgment that when this loss reaches a certain size, it must be borne by the public at large. *Agins*, 447 U.S. at 260; *see* D. Hagman & D. Misczynski, *Windfalls for Wipeouts: Land Value Capture and Compensation* (1978). If this burden were not shared, the imposition of regulations, except for possible litigation expenses, would be costless. A governmental entity would therefore have no incentive to avoid the imposition of effectively destructive regulations.

The just compensation clause does not achieve an optimal solution. It operates only in egregious cases to, as Professor Tribe puts it, "limit arbitrary sacrifice of the few to the many." L. Tribe, *American Constitutional Law* § 9-4 (1978); *see* Bauman, *supra*, at 59-69 (discussing "philosophical imperative" underlying inverse condemnation). Complementing the efficiency argument is the even more fundamental point that the Fifth Amendment demands "fairness" in its administration. *San Diego Gas*, Brennan,

450 U.S. at 656, 660. Still, the award of compensation offers some check, even if small, on clear overuse of the zoning power.

B. Compensation Will Not Chill the Exercise of Necessary and Proper Governmental Actions

Amici perceive, rightly, that awards of compensation may result in some decrease in the degree of zoning activity. But the decrease will only be in unconstitutional activities. Compensation will have a salutary effect on proper planning by reducing the incentive for regulatory actions that result in uncompensated takings. As Justice Brennan points out, "[i]nvalidation hardly prevents enactment of subsequent unconstitutional regulations by the government entity." *San Diego Gas*, 450 U.S. at 655 n.22. That opinion quotes a California city attorney advising other city attorneys that "'IF ALL ELSE FAILS, MERELY AMEND THE REGULATION AND START OVER AGAIN.'" *Id.* Compensation serves not only as a remedy but also as a deterrent to future misconduct.

When the effect of regulations is found to be excessively harsh, the governmental agency has the choice of permanently taking the property interest or amending the regulation. The only money that it must pay is compensation for the interest for the time during which the regulations were in place. Finally, as Justice Brennan notes, "one may wonder as an empirical matter whether the threat of just compensation will greatly impede the efforts of planners." *San Diego Gas*, 450 U.S. at 661 n.26. Certainly in the years the inverse condemnation remedy has been available in the lower courts, American land use planning has been as vigorous as ever.

C. The Compensation Remedy Will Not Result in a Run on the Municipal Fisc

Despite amici's rhetoric, they offer no support for their fears of fiscal disaster. No such public ruin has occurred in

the analogous lifting by the courts of sovereign immunity for tort, and a taking is much harder to prove than the commission of a tort. This Court has recognized that "government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," *Penn Central*, 438 U.S. at 124 (quoting *Pennsylvania Coal*, 260 U.S. at 413). Accordingly, the courts have made clear that a taking through zoning regulations can be found only in extreme circumstances based on case-by-case determinations. As Justice Harlan said in his *Bivens* concurrence, the "social values" emphasized in the Constitution are more important than preventing fiscal and judicial resources from being stretched further by recognition of a damages remedy for abusive state action. *Bivens*, 430 U.S. at 410-11.

D. Awarding Compensation Does Not Transfer the Power of Eminent Domain from Legislatures to the Judiciary

This argument, like the ones above, ignores the limited scope of relief that Hamilton sought. Hamilton is not asking the Court to force Petitioners to condemn the land in question. That is clearly a decision that only Petitioners should make. Rather, Hamilton seeks only to recover compensation for a taking that has already occurred. Amici concede that "it is indisputably the court's obligation to determine whether a regulatory measure effects a taking in a particular case." Brief of State of California, et al., at 14. For amici then to contend that the court cannot enforce a constitutionally mandated remedy is to infringe upon the role of the judiciary.

Petitioners and some amici contend that the only proper remedy for any taking in the regulatory context is injunctive relief. The amici States suggest that the reviewing court retain jurisdiction over the dispute until the regulatory body enacts constitutional regulations. Brief of State of California, et al., at 8-9. Yet this scheme is contrary to the

traditional doctrine that a court will impose equitable remedies only where the legal remedy is inadequate. It would also interject the courts directly into the land use regulatory process on a continuing jurisdictional basis, which would be an inefficient use of judicial resources. With compensation for a temporary taking in the limited number of cases that can prove a taking, a community is free to keep, revoke or amend the offending regulation.

It is black letter law that an injunction is an extraordinary remedy; it "is not a remedy which issues as of course." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1982) (citing *Harrisonville v. W. S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 337-38 (1933)). This Court has "repeatedly held" that the basis for injunctive relief in the federal courts is a showing of irreparable injury and the inadequacy of any legal remedy. *Weinberger*, 456 U.S. at 312; *see also Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 60 (1975); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 478 (1972); *Beacon Theatres v. Westover*, 359 U.S. 500, 506-07 (1959).

For the taking of property, whether by regulation or by physical occupation, there exists an adequate remedy at law. That remedy is set forth in the just compensation clause. As this Court has noted, "[t]he payment of just compensation serves to place the landowner in the same position monetarily as he would have occupied if his property had not been taken." *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 473-74 (1973); *United States v. Reynolds*, 397 U.S. 14, 16 (1970). And in *Ruckelshaus*, 104 S.Ct. at 2880, the Court stated:

> Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking. (citations omitted).

Respondent respectfully suggests that amici's argument is backwards, and that, in fact, the granting of monetary

relief will be far less intrusive than the close supervision of the zoning process advocated by amici.

IV. Respondent's Suit is Ripe for Adjudication

Petitioners and amici raise a number of strained arguments regarding ripeness, mootness, exhaustion of administrative remedies and exhaustion of state judicial remedies. By mixing these objections, Petitioners and amici no doubt hope to achieve a synergistic effect that no single argument could accomplish. Contrary to their arguments, however, the inverse condemnation issue in this case is ripe for disposition by the Court.

In *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 191-92 (1959), this Court noted:

> It is suggested, however, that abstention is justified on grounds of avoiding the hazard of friction in federal-state relations any time a District Court is called on to adjudicate a case involving the State's power of eminent domain, even though, as in this case, the District Court would simply be applying state law in the same manner as would a state court. But the fact that a case concerns a State's power of eminent domain no more justifies abstention than the fact that it involves any other issue related to sovereignty. Surely eminent domain is no more mystically involved with "sovereign prerogative" than a State's power to regulate fishing in its waters, its power to regulate intrastate trucking rates, a city's power to issue certain bonds without a referendum, its power to license motor vehicles, and a host of other governmental activities carried on by the States and their subdivisions which have been brought into question in the Federal District Courts despite suggestions that those courts should have stayed their hand pending prior state court determination of state law. (citations omitted).

The reasoning of the Court is plainly applicable in the instant case. When there is a federal constitutional claim involving a state regulation, that claim can be brought in federal court.

Numerous cases involving inverse condemnation and other land use issues have been brought in federal courts. *See supra* page 28 & note 13 (listing recent appellate cases). This Court has previously decided at least four zoning cases that were originally brought in federal court. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976); *Warth v. Seldin*, 422 U.S. 490 (1975) (§ 1983 case); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (§ 1983 case); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).[15]

These cases make clear the fundamental point that the Fifth and Fourteenth Amendments insure, at minimum, *the right to make a claim for a taking of property.*

> Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right. . . . In fact, a *fundamental interdependence* exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. *That rights in property are basic civil rights has long been recognized.*

Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972) (emphasis added) (federal court case challenging state garnishment statute under § 1983).

A. State Judicial Review Is Not a Prerequisite to a Federal Constitutional Claim

Hamilton brought this suit in federal court alleging, *inter alia*, that the planning commission had taken its property without just compensation. Hamilton sought judicial review in federal court only after it exhausted all avenues of relief before the commission and determined that any other efforts would be futile. *See supra* pages 10-13. The United

[15] *See* Kanner, *Inverse Condemnation Remedies in an Era of Uncertainty* in Southwestern Legal Foundation, Proceedings of the Institute on Planning, Zoning, and Eminent Domain 177, 195-206 (1980); Rockwell, *Constitutional Violations in Zoning: The Emerging Section 1983 Damage Remedy*, 33 U. Fla. L. Rev. 168 (1981).

States urges that there is no deprivation of property without just compensation, however, until a state court determines that no compensation should be awarded.[16]

It is a long-standing rule of law that the existence of a state remedy does not preclude federal court consideration

[16] The United States cites two Tennessee statutes that it claims provide an adequate state law remedy for Hamilton's takings claim: Tenn. Code Ann. § 27-9-101 and § 29-16-123. *See* Brief for the United States at 11, 16 & n.11. Section 27-9-101 provides for review of "any final order or judgment of any board or commission functioning under the laws of this state." Review under that section is accomplished by filing a petition for a common law writ of certiorari. The Tennessee Supreme Court held last year, however, that litigants "who seek review of zoning action taken by county or municipal authorities" must file declaratory judgment actions; the petition for common law writ of certiorari pursuant to § 27-9-101 is inappropriate in zoning actions. *Fallin v. Knox County Board of Commissioners*, 656 S.W.2d 338 (Tenn. 1983). A litigant cannot seek just compensation through a declaratory action. Therefore, the state remedy under *Fallin* is inadequate.

Section 29-16-123 allows an inverse condemnation action when "such person or company has actually taken possession of such land, occupying it for the purposes of internal improvement." The cases cited by the United States do not establish that inverse condemnation suits for regulatory takings, as opposed to suits based on actual possession of land, will lie under this statute. The statement to that effect by the Tennessee Court of Appeals in *Davis v. Metropolitan Government of Nashville and Davidson County*, 620 S.W.2d 532 (Tenn. App.), *cert. denied* (Tenn. 1981), is dicta and cites as support an earlier case in which the zoning challenge was brought not under § 29-16-123 but as a petition for a common law writ of certiorari. *See Bayside Warehouse Co. v. Memphis*, 63 Tenn. App. 268, 470 S.W.2d 375 (1971). Furthermore, the language of § 29-16-123 is not exclusive. The statute uses the permissive "may." *Cf. Rogers v. City of Nashville*, 40 Tenn. App. 170, 289 S.W.2d 868, *cert. denied* (Tenn. 1955).

Even if the remedies provided by Tennessee statute were available to Hamilton, there is no requirement that a plaintiff exhaust state remedies prior to filing a § 1983 action. *Henderson v. Bentley*, 500 F. Supp. 62, 63 (E.D. Tenn. 1980), *aff'd*, 698 F.2d 1219 (6th Cir. 1982) (no requirement to exhaust § 27-9-101).

where a federal constitutional violation is alleged. *Home Telephone & Telegraph Co. v. City of Los Angeles*, 227 U.S. 278 (1913); *see also Monroe v. Pape*, 365 U.S. 167 (1961). To support its novel proposition, the United States seeks support in this Court's due process clause opinions, relying primarily on *Parratt v. Taylor*, 451 U.S. 527 (1981). But in the instant case, the issue is not due process but whether the zoning regulations as applied to Hamilton effected a taking for which just compensation is due.

Even if *Parratt* is viewed as applicable here, it still would not dictate that Hamilton's only remedy lay in state court. Central to the holding in *Parratt* was the fact that the deprivation of property was the result of a random act of negligence and did not occur as a result of some established state procedure. "The loss of property, although attributable to the State as action under color of law, is in almost all cases beyond the control of the State." *Parratt*, 451 U.S. at 541; *see also Hudson v. Palmer*, 104 S.Ct. 3194 (1984). The Court later held that post-deprivation remedies do not satisfy due process where the deprivation of property was caused by conduct pursuant to established state procedure, rather than random and unauthorized acts. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). The loss of property here was not beyond the control of the state; rather, it was the result of a detailed state procedure governing regulation of land. This is just the situation in which recourse to federal courts was held proper in *Logan*.

Finally, upholding Hamilton's position in this case would not "make of the Fourteenth Amendment a font of [land use law and remedies]," as the United States brief misquotes *Parratt* as stating. Brief for the United States at 10. The taking issue affects only the application of a small number

of zoning regulations and is in no way relevant to most land use decisions.[17]

B. Administrative Remedies Were Exhausted

Hamilton was confronted with a planning commission that, beginning in 1979, adopted a "no-growth" policy (*supra* notes 3, 5; R. 54-60, 111-12, 244-45). The commission required Hamilton to provide fire protection, even though no such requirement was contained in the regulations. Hamilton complied by obtaining a commitment for a twenty year contract for fire protection. (R. 268). The commission requested that Hamilton eliminate certain cul-de-sacs, and Hamilton responded with a plan to eliminate the problem. (R. 266). The developer requested that a special committee be appointed to assist the developer in satisfying the commission's new demands. (R. 100). The special committee recommended waiving several of the commission's requirements (R. 486-87, 494), but the commission rejected this recommendation and continued to insist on full compliance. (R. 175-76). Other efforts were made by Hamilton, including a series of meetings with commission officials and submission of alternative plats to the commission. *See supra* pages 12-13. The record is totally devoid of any evidence indicating the planning commission was willing to approve *anything* in Temple Hills, regardless of how many concessions Hamilton made, until it became apparent to the commission at trial that it was going to lose the case. Only then did the county engineer indicate that the county might be willing to approve an "alternative" plan. That

[17] The United States also cites *Agins* and *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), incorrectly for the proposition that Hamilton was required to exhaust its state judicial remedies before seeking review in federal court. Brief for the United States at 11, 16. In *Agins*, of course, the zoning ordinance was merely challenged *on its face*, and the Court held that the mere enactment of the zoning ordinance did not constitute a taking. 447 U.S. at 260. The suit in *Hodel* was a *facial* challenge to a federal statute.

alternative was rejected by the jury, for obvious reasons, as a pretext. (R. 1431-32, 1451, 1455-57).

Petitioners also argue that *Agins* supports their contention that this case is not ripe for adjudication. In *Agins*, however, the zoning ordinance was merely challenged on its face, and the court held that the mere enactment did not constitute a taking. 447 U.S. at 260. In *Agins*, the property owners never submitted any development plans to the city; in this case, the on-going cluster subdivision had a seven year history of county approved preliminary plats, final plats, recordation of plats by the county, issuance of building permits, actual construction of some homes, and millions spent by the property owners to acquire the land and to build sewer lines, water lines, roads, etc. for the entire project. In *Agins*, the challenged zoning ordinance still permitted one to five houses on the subject property; in this case, nothing could be done with Hamilton's land. (Sixty-seven houses could be built, in theory, but the trial record makes clear, and the jury found, that it was economically impossible to do so.) In *Agins*, the case came to this Court only on the sustaining of a demurrer; in this case, an exhaustive trial was conducted, and the case was submitted to a jury.

In *Agins*, this Court expressly and narrowly held that the zoning on its face did not take appellant's property and, therefore, declined to address the inverse condemnation remedy issue. In this case, a regulatory taking clearly occurred, requiring that the inverse condemnation issue be squarely met.

Amici argue that Hamilton failed to seek a variance from the regulations. But the record establishes that the board of zoning appeals had already ruled that Temple Hills could continue to develop under the 1973 regulations, that the planning commission then refused to follow the decision of the board of zoning appeals, and that the county attorney indicated that any new appeal to the board of zoning appeals would be *futile*. *Supra* page 13. Additionally, through the series of approvals and reapprovals between

1973 and 1979, the commission had obviously granted *de facto* variances to the developers. The testimony is clear and unequivocal that the pre-1979 planning commission knew its own regulations, the nature of the development and the topography of the land. *Supra* pages 6-9. Although Hamilton made every effort to comply in good faith with the requirements of the post-1979 commission, Hamilton continued to rely upon previous commission approvals and the *de facto* variances that necessarily accompanied those approvals.[18]

Of course, there is no requirement that a plaintiff exhaust his administrative remedies before bringing a section 1983 action. *Patsy v. Board of Regents*, 457 U.S. 496 (1982); *Wilwording v. Swenson*, 404 U.S. 249 (1971); *Henderson v. Bentley*, 500 F. Supp. 62, 63 (E.D. Tenn. 1980), *aff'd*, 698 F.2d 1219 (6th Cir. 1982) (plaintiff need not exhaust remedies under Tenn. Code Ann. § 27-9-101 before bringing § 1983 suit). Be that as it may, Hamilton did everything possible to resolve the conflict with the commission before resorting to the delays and expense of court action.

C. Petitioners' Actions That Effected a Taking Were Authorized by State Law

The jury found that the planning commission was estopped under state law from applying new zoning regulations to Hamilton's development. The United States claims that this finding somehow means that the commission's actions

[18] Petitioners contend remarkably that this case was rendered moot by the commission's approval of a preliminary plat pursuant to a settlement in March 1983 *after* the trial. Ignoring the fact that this settlement agreement was entered into for reasons that do not appear on the record, it should be noted that in the agreement the commission dropped most of the requirements it imposed between 1979 and 1983, including the limit on the number of units it would approve and the proscription against cluster units. The fact that the *estoppel* claim was settled and the appeal of that issue dismissed has *nothing* to do with the compensable *temporary* taking issue before this Court.

"were not authorized by state law," and thus they cannot give rise to a claim for just compensation. But the courts below only found the commission estopped from interfering with Hamilton's vested rights. They did *not* also find that the commission acted outside its authority; the commission won on the due process and equal protection issues. The United States completely misapplies cases like *Hooe v. United States*, 218 U.S. 322 (1910), and *Yearsley v. W. A. Ross Construction Co.*, 309 U.S. 18 (1940).

There is no doubt that the planning commission was acting within the authority granted it by state statute to enact land use regulations, and that this authority was validly conferred. The United States contends, however, that if the commission acted in a manner inconsistent with *any* state law, no taking could occur. As the Sixth Circuit explained, this argument logically extended would result in there never being a taking without just compensation, since most state constitutions prohibit non-compensable takings. *Hamilton Bank*, 729 F.2d at 407 n.6, J.A. at 53 n.6. Neither case law nor common sense supports Petitioners' contention.[19]

[19] Petitioners and amici also raise several additional arguments of a general nature. For example, the United States contends that no taking has been effected because the application of the regulations "did not require respondent to cease any *existing* use of the land in its unimproved state." Brief for the United States at 25. This argument is disingenuous. Until the application of the new regulations, the use of the subject property was residential. When the commission failed to reapprove the plat, the property was undevelopable and could not be used for residential (or any other) purposes.

Likewise deficient is the argument that there was no substantial change in the relevant provisions of the regulations between 1973 and 1981. It was not the words so much as the interpretation and application of the regulations that changed in 1979. As the Sixth Circuit noted, "[t]he plat was apparently in compliance under one interpretation of the zoning regulations, but not under an alternative interpretation." (729 F.2d at 403, J.A. at 45). It was the interpretation of the regulations as they were *applied* to Temple Hills by the post-1979 commission that resulted in the taking.

(Footnote continued on next page)

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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(Footnote 19 continued)

Amici imply that Hamilton purchased the property with knowledge that the commission had disapproved the plat. The record reveals, however, that Hamilton invested in the property in reliance on previous commission approvals (R. 789-90) and had purchased the property after the preliminary plat had been reapproved in 1978 under the original standards. Although the planning commission did reject the preliminary plat on October 2, 1980, on October 3, the secretary directed the developer to the board of zoning appeals and on November 11 the board of zoning appeals ruled that the 1973 regulations applied to Temple Hills. *Supra* pp. 11-12. It was *after* the board of zoning appeals decision and *before* any indication that the commission would not abide by the board's decision that Hamilton purchased the property on November 26, 1980.

Finally, some amici argue that Hamilton's losses were the result of a general decline in the housing industry. The record, however, reveals that Williamson County was the fastest growing county in Tennessee and that houses in this area were selling as fast as they could be built. (R. 928, 1627).